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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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ELLEN SCHALL, Commissioner of the New York City Department of Juvenile Justice, and ROBERT ABRAMS, Attorney General of the State of New York,
*Appellants*

v.

GREGORY MARTIN, *et al.*,
*Appellees*

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**On Appeals from the United States Court of Appeals for the Second Circuit**

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## BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

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## BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

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### INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter ABA] is a voluntary, national membership organization of the legal profession. Its nearly 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement

and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields. Since its inception over one hundred years ago, the ABA has taken an active interest in the improvement of the administration of justice, and in recent years a specific interest in the improvement of the administration of the juvenile justice system.

In 1973 the ABA became co-sponsor of the Juvenile Justice Standards Project, initiated two years earlier by the Institute of Judicial Administration. The purpose of the project was to develop a set of standards addressing major issues in the administration of the juvenile justice system comparable in scope and comprehensiveness to the ABA *Standards for Criminal Justice*. Toward this end the ABA involved distinguished lawyers and judges as well as specialists in social work, psychology, education, sociology, psychiatry, corrections, law enforcement, and health care, in the drafting of proposed standards. Tentative drafts were widely distributed to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The work of the Juvenile Justice Standards Project culminated in the publication of twenty-three volumes of standards relating to almost every aspect of juvenile justice administration. The House of Delegates of the American Bar Association approved twenty of the twenty-three volumes as the official policy of the ABA. Among those volumes approved is one entitled *Institute of Judicial Administration/American Bar Association Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition* [hereinafter *ABA Juvenile Detention Standards*], adopted by the House of Delegates in February of 1979.

The *ABA Juvenile Detention Standards* speak directly to the subject matter before the Court in this lawsuit: pretrial detention of accused juvenile offenders. The ABA

considers pretrial detention of children "one of the most serious problems in the administration of juvenile justice." *ABA Juvenile Detention Standards* at 1. The strict limitation of detention prior to adjudication has been identified as one of the ten basic principles underlying the entire Juvenile Justice Standards Project. *Juvenile Justice Standards: A Summary and Analysis* (1982) 22-27. In fact specific reference is made to the practice in New York State as an illustration of "the inadequacy of procedures for the pretrial detention of juveniles which these standards would address." *ABA Juvenile Detention Standards*, commentary to Standard 6.6 at 80. (*People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 385 N.Y.S.2d 518, 350 N.E.2d 906 (1976), the New York State Court of Appeals decision upholding the statute subsequently challenged by the plaintiffs in this case is the subject of two pages of critical commentary. *ABA Juvenile Detention Standards* at 80-82).

The *ABA Juvenile Detention Standards* specifically address the importance of those substantive and procedural protections, the absence of which is cited by the Second Circuit Court of Appeals in striking down Section 739(a)(ii) of the New York Family Court Act [recodified by 1983 amendment and hereinafter referred to a F.C.A. § 320.5(3)(b)]. However, because the parties in this action approach the issues raised from a different perspective than that set forth in the Standards, none of the parties has presented the position of the ABA on juvenile detention procedures.

The Association participates as *amicus curiae* to call this Court's attention to the *ABA Juvenile Detention Standards* and to suggest that, for reasons set forth and supported by those standards, this Court affirm the decision of the United States Court of Appeals for the Second Circuit striking down the broad statutory authorization for pretrial detention of juveniles enacted by New York State.

## SUMMARY OF ARGUMENT

The pretrial detention of a juvenile constitutes a serious deprivation of liberty protected by the Fourteenth Amendment to the United States Constitution. In determining the constitutionality of a statutory scheme for effecting pretrial detention, traditional due process analysis requires the Court to balance the private interests affected, the risk of erroneous deprivation of these interests through the procedures used, the probable value of alternative or additional procedures, and the governmental interest, including the function involved and the burden of alternative or additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

It was the analysis and examination of these factors in the context of the pretrial decisionmaking process that resulted in the generation of the *ABA Juvenile Detention Standards*. The ABA sought to evaluate the individual and governmental interests at stake, identify appropriate circumstances for pretrial detention in light of these interests, and propose procedures to ensure that such circumstances are established with an acceptable degree of accuracy by procedurally fair means before such detention is imposed. The *ABA Juvenile Detention Standards* are not a minimum due process model nor does the ABA ask the Court to adopt them as such. These standards do represent a balanced resolution of a serious societal problem. They seek to reconcile the sometimes competing goals of protecting both community safety and individual liberty. The ABA efforts thus provide a touchstone from which factors to be considered in due process analysis can be drawn and against which the challenged practice can be contrasted and evaluated.

The New York Family Court Act permits the detention of any juvenile accused of delinquency when the judge concludes without reference to any established specific criteria that there is a serious risk that the juvenile may commit a crime if released prior to trial. F.C.A.

§ 320.5(3)(b). The statute permits such preventive detention without a prompt prior determination of probable cause to believe that the child committed an offense, without regard to the nature of the charge or the likelihood of incarceration following conviction, and without other substantive and procedural safeguards to restrict such detention to circumstances in which it is necessary to promote legitimate governmental interests. The absence of such safeguards and limitations has resulted in detention which the lower federal courts found to be arbitrary and capricious.

In this brief, the ABA sets forth its position with respect to each of the factors to be considered by the Court under *Mathews v. Eldridge* in determining the constitutionality of the New York procedure for preventive detention of juveniles and argues that an appropriate analysis of these factors supports the affirmance of the decision of the Second Circuit Court of Appeals holding the New York procedure unconstitutional.

## ARGUMENT

### SECTION 320.5(3)(b) OF THE NEW YORK FAMILY COURT ACT IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROVIDE SPECIFIC GUIDELINES AND CRITERIA FOR DETERMINING THE APPROPRIATENESS OF PREVENTIVE DETENTION AND THUS RESULTS IN AN UNACCEPTABLY HIGH RATE OF PRETRIAL DETENTION OF CHILDREN WHO POSE NO SERIOUS PRETRIAL THREAT TO COMMUNITY SAFETY

#### Introduction

The issue before this Court in this case is whether preventive detention of accused juveniles pursuant to Section 320.5(3)(b) of the New York Family Court Act violates the due process clause of the Fourteenth Amendment. The District Court and the Court of Appeals found that the operation of the challenged statute has resulted in the pretrial detention for dangerousness of large numbers of accused juveniles against whom the evidence of guilt is so weak that charges are dismissed or withdrawn or who are found to be insufficiently dangerous upon conviction to be incarcerated. J.A. 59-61, 64-65, 102-103, 111. The Court of Appeals concluded that this high rate of detention of children who are apparently either not guilty or not dangerous results from the overly broad terms of the New York statute and that such detention is arbitrary and irrational. J.A. 112, 114.

The American Bar Association, based upon the analysis of issues relating to pretrial detention set forth in the *ABA Juvenile Detention Standards*, urges affirmance of the Second Circuit decision that the New York statute violates due process. The *ABA Juvenile Detention Standards* provide guidance for those seeking an appropriate balance between governmental interests in protecting the community from pretrial misconduct by those accused of crimes and the liberty interests of those who stand accused but not convicted. They seek to minimize two significant risks in pretrial decisionmaking: the risk of re-

leasing a juvenile who poses a serious danger to society and the risk of erroneously detaining a juvenile who does not.

The *ABA Juvenile Detention Standards* are intended to serve as guidelines for action by legislators, judges, administrators and others responsible for or concerned with the treatment of youths at local, state and federal levels. Though they establish specific procedural and substantive criteria which the ABA considers prudent as a matter of public policy, the ABA does not contend that these procedures are the only ones which comport with the requirements of due process or that they reflect the minimally acceptable constitutional standard.

Nevertheless, the *ABA Juvenile Detention Standards* are relevant to the constitutional issues presented in this case. This combined effort of the large body of experts on the subject, both lawyers and non-lawyers, to agree on the procedures and standards deemed most desirable in the public interest is entitled to be weighed in determining the scope of the constitutional requirements. The New York statute is not unconstitutional simply because it does not conform in each and every respect to the *ABA Juvenile Detention Standards*. However, when procedures for pretrial preventive detention depart so radically from these carefully considered standards, that fact should be given weight in determining what the Constitution requires. The goals of the draftsman of these standards are not very different from the object of the due process clause—a fair system of judicial administration which adequately safeguards the interests of both the public at large and the individual juvenile charged with a crime.

Moreover, the *ABA Juvenile Detention Standards* speak directly to the factors which the Court must address in the course of any due process analysis. They identify relevant interests to be balanced in evaluating any scheme for pretrial preventive detention and examine the value of procedural and substantive guidelines for advancing legitimate state interests while protecting individual lib-

erty. The ABA contends that the Constitution at a minimum requires that there be some procedural and substantive limitations on the use of prediction of dangerousness as a basis for pretrial detention of juveniles. The ABA does not and the Court need not use this particular case to delineate precisely what procedural and substantive limitations are constitutional minima. That may well be more appropriately resolved in the context of a specific case presenting specific alternative criteria and guidelines and presenting a record documenting the results of such detention.

The issue in this case, on the other hand, is the constitutionality of a scheme for preventive detention based upon a prediction of interim misconduct that provides no criteria or limitations for making such a determination. The Amici supporting the appellants suggest that the Court must choose between two extreme positions: that preventive detention without substantive and procedural limitations is constitutional or that no preventive detention whatsoever is constitutional. Amici Curiae Brief in Support of Appellant and Intervenor-Appellant on Behalf of Pennsylvania, et al. at 22-24. The *ABA Juvenile Detention Standards* adopt a middle ground position which recognizes that the extremes fail to account for legitimate concerns of both the state and the child in pretrial detention decisions. The ABA Standards also stand as a strong rebuttal of the assertion made by the Amici that a finding that the New York scheme is unconstitutional will threaten the continued existence of the juvenile justice system. Amici Curiae Brief in Support of Appellant and Intervenor-Appellant on Behalf of Pennsylvania, et al. at 24-26. The *ABA Juvenile Detention Standards* constitute a rejection of the New York approach by experts intimately involved with and actively supportive of the juvenile justice system. These experts favor a more reasoned scheme for preventive detention.[1]

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[1] The assertions of the Amici are reminiscent of those heard when *In re Gault* was argued. In that case it was asserted that

In the following section the ABA sets forth the constitutional test to be applied in this case, and the ABA position with respect to the interests which must be balanced and the factors which must be considered by the Court in applying the test. The *ABA Juvenile Detention Standards* are cited to show that constitutional procedures can be drafted which protect legitimate state interests while avoiding the excessive rate of error that characterizes the operation of the New York statute. The comparison of the *Standards* with the New York statute helps to highlight the substantive and procedural deficiencies of the New York statute which, when viewed in light of traditional due process analysis, render the statute invalid, as the Court of Appeals for the Second Circuit held.

**A. Procedures such as those set forth in the ABA Juvenile Justice Standards will significantly reduce the risk of erroneous pretrial detention which presently exists under Section 320.5(3)(b) without unduly affecting legitimate governmental concerns for community safety.**

The essence of the ABA position with respect to pretrial detention of juveniles under the challenged statutory scheme is that additional safeguards are constitutionally required to reduce the high incidence of errone-

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substantive or procedural limitations on the juvenile court's discretion would compel the states to abandon the substantive benefits of the juvenile process. 387 U.S. 1, 21 (1967). The Court found there that absence of substantive and procedural limitations on the decisionmaking process in juvenile court and radical departure from traditional legal principles of the criminal justice system resulted in arbitrariness rather than benevolence, unfairness to individuals, and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. *Id.* at 19-20. The Court correctly held then that standards and limitations on the unbridled discretion of the juvenile court were not contrary to the purposes and goals of the juvenile court. The Court's finding in this regard is as applicable in the context of pretrial detention decisions as it was in the context of the adjudicatory hearings addressed in *Gault*.

ous detention that results under the New York statute. Of course, given the recognized state interest to protect the public it is essential to set forth an alternative which will advance that interest without running afoul of the Fourteenth Amendment. The *ABA Juvenile Detention Standards* provide procedures and criteria for effecting detention when necessary and appropriate in the pretrial period, without the high margin of error which results under the New York statute.

First, the *ABA Juvenile Detention Standards* distinguish between the state interest in preventing pretrial behavior which threatens the physical safety of the community and that criminal misconduct which presents less compelling justification for pretrial intervention. The risk of error in predicting dangerousness in general remains great, *see, e.g.*, Diamond, "The Psychiatric Prediction of Dangerous," 123 U.Pa.L.Rev. 439 (1974); Dershowitz, "Psychiatry in the Legal Process: A Knife that Cuts Both Ways," 51 Judicature 370 (1968); however, the countervailing interests in favor of allowing some consideration of dangerousness when the irreparable harm of violent crime is the perceived danger are substantial. The *ABA Juvenile Detention Standards* therefore recognize as a permissible purpose for pretrial detention or control "reducing the likelihood that the juvenile may inflict serious bodily harm on others during the interim." *ABA Juvenile Detention Standards* 3.2B. While the New York Family Court Act allows detention to prevent any criminal misconduct, pretrial preventive detention under the *ABA Juvenile Detention Standards* focuses specifically on prevention of crimes of direct violence and serious crimes against property, such as arson and bombing, which involves substantial risks of serious bodily harm. *Id.*, commentary at 51.

Second, the *ABA Juvenile Detention Standards* distinguish between use of detention to further the permissible goal of community protection and use of means short of

detention. It is a premise of these standards, supported by numerous studies, that release under conditions or release under supervision is a less drastic but very effective alternative for protecting community safety. *See* P. Wise, *Freedom for Sale* 77-79 (1974); W. Thomas, *Bail Reform in America* 244-45 (1976); P. Venezi, *Pretrial Release With Supportive Services for "High Risk" Defendants* 48-49 (1973); National Center for State Courts, *An Evaluation of Policy Related Research on the Effectiveness of Pretrial Release Programs* (1975). Reasonable restrictions on the activities, movements, associations and residences of the accused, prohibiting the accused from possessing weapons or using drugs or alcohol, and requiring periodic reporting to designated persons or agencies are among the conditions of pretrial release which in most cases can accomplish the legitimate interests of the state in the protection of the community. *See ABA Juvenile Detention Standards* 2.6, 2.7, 2.8. *See also, ABA Standards for Criminal Justice: Pretrial Release* [hereinafter *Pretrial Release*] 10-5.2 and commentary thereto. If the conditions of release are tailored to the problems of the individual defendant, he is likely to violate one or more of the conditions and be subject to release revocation for doing so before absconding or committing a new crime. *See, Pretrial Release* 10-5.2, commentary at 72. Violation of conditions of release is a permissible basis for termination of release. *ABA Juvenile Detention Standards* 4.6

Use of pretrial detention as an initial interim status is restricted under these standards to situations in which the charge itself is of the type which poses the most serious threat to the community—a serious crime of violence. *ABA Juvenile Detention Standards* 6.6A. While studies indicate that predictions of proclivity to commit additional crimes in the interim based upon the charge are subject to serious risks of error, there is some support for the assertion that a person who has exhibited violent behavior is more likely to exhibit violent behavior in the

future than the person who has no record of violent behavior. Monahan, *Ethical Issues in The Predication of Criminal Violence* 11 (1978). Thus requiring at least the allegation of serious violent misconduct should reduce somewhat the risk of error. The New York statute by contrast permits detention for dangerousness to be invoked no matter how minor the underlying offense is.

Third, the *ABA Juvenile Detention Standards* permit pretrial detention based on a serious offense only if upon a finding of guilt the disposition is likely to be commitment to a secure facility. *ABA Juvenile Detention Standards* 6.6A.1. If the charge or circumstances are such that commitment is not the likely outcome of the proceedings and the child will be placed back in the community, there is insufficient justification for pretrial detention. Detention under such circumstances is punishment prior to trial. This was precisely the finding of the Second Circuit with respect to the New York procedure and requiring an evaluation of the likelihood of post-trial incarceration is designed to decrease this risk. J.A. 113-14.

Fourth, the *ABA Juvenile Detention Standards* require that the circumstances justifying detention for the protection of the community be established by means that are procedurally fair. They therefore require a prompt release hearing at which a judicial determination of probable cause is made that the accused committed the offense with which he is charged. *ABA Juvenile Detention Standards* 7.6. This is a basic requirement of the Fourth Amendment recognized by this Court in the criminal context, *see Gerstein* v. *Pugh*, 420 U.S. 103, 120 (1975), which is equally applicable to juveniles. *See Moss v. Weaver*, 525 F.2d 1258 (5th Cir. 1976). The New York statute requires a probable cause determination usually within seventy-two hours but in some circumstances with an additional delay of three judicial days. F.C.A. § 325.1.

Both the *ABA Juvenile Detention Standards* and the New York Family Court Act further require that the ju-

venile be provided notice of the hearing, the right to legal representation, and access to information on which the judge will base his or her determination. *ABA Juvenile Detention Standards* 7.6; F.C.A. §§ 320.2-320.5, 325.2. However, under the standards, the decision to detain based upon risk of misconduct must be made upon clear and convincing evidence both that there is a serious probability of risk of bodily harm to others if the juvenile is released and that no acceptable alternative to detention exists which could reasonably reduce the risk of misconduct. The New York statute requires no standard of proof designed to decrease the risk of error.

While no jurisdiction has implemented precisely the detention criteria set forth in the *ABA Juvenile Detention Standards*, similarly strict criteria have been imposed in a number of instances. The results support the contentions of the ABA regarding the value of criteria and standards in reducing the risk of error. Studies of the effect of implementation have shown that use of narrow and specific criteria can reduce detention without increasing rearrest rates. In one study, for example, data indicated that prior to the implementation of narrow, specific criteria for detention, 280 children out of a total of 425 children were detained. Of the 145 juveniles released, 41 were rearrested within 180 days. In contrast, following the implementation of specific and narrow detention criteria, of 380 cases, 89 children were detained. Of the 291 children released, 38 were rearrested within a 180 day period. Kentucky Youth Advocates, *A Community Response to a Crisis: The Effective Use of Detention in Jefferson County, Kentucky* (1980). In effect, while the number of children who were detained was reduced substantially, there was no increase in rearrests and in fact a significant drop in the rearrest rate. Another study of comparative rates of detention and rearrest following adoption of specific detention criteria showed a reduction in average numbers detained per day from 16 to 12, and

a drop in the rearrest rates of those released from 3.2% to 1.7% Colorado Division of Youth Services, *The Arapahoe Detention Alternative Program* (1981). Use of specific criteria governing the discretion to detain significantly decreases the number of children unnecessarily subjected to pretrial detention without any deleterious effects on public safety.

Articulating a rational explanation for the structure of the New York statute is particularly difficult because New York exempts from preventive detention those children who arguably present the greatest risk of interim crime and instead subjects to such detention those who present the least risk and who are most vulnerable to the harmful effects of detention. Sixteen and seventeen year-olds charged with any offense are processed through the criminal courts, N.Y. Penal Law § 30.00(1) (McKinney Supp. 1982), where they are entitled to release under the traditional criteria applied under the New York bail system. N.Y. Crim. Proc. Law § 530.10 *et seq.* (McKinney Supp. 1982). Fourteen and fifteen year-olds charged with serious crimes are also processed as adults and cannot be detained based on a prediction of likelihood to commit further crime, and thirteen year-olds charged with first or second degree murder are similarly treated. N.Y. Penal Law § 30.00(2) (McKinney Supp. 1982); N.Y. Crim. Proc. Law § 530.10 *et seq.* (McKinney Supp. 1982). Thus the population subject to pretrial detention based on the generalized prediction of dangerousness are the youngest (and most vulnerable) of the juvenile population and those who have committed the least serious offenses.[2]

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[2] The New York scheme for standardless preventive detention of juveniles thus stands in sharp contrast to the adult preventive detention schemes which have been the subject of recent litigation, *see United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) and *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot per curiam*, —— U.S. ——, 102 S.Ct. 1181, 71 L. Ed. 2d 353 (1982). Even the most ardent supporters of preventive detention recognize

**B. Given that far less drastic, yet effective, alternatives to the New York preventive detention scheme exist, section 320.5(3)(b) is unconstitutional under traditional due process analysis.**

In determining the constitutionality of a statutory scheme for effecting pretrial detention, traditional due process analysis requires the Court to balance the private interests affected, the risk of erroneous deprivation of these interests through the procedures used, the probable value of alternative or additional procedures, and the governmental interest including the function involved and the burden of alternative or additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

This analysis is not conducted in a vacuum. A most basic constitutional principle is that no person can be punished without first being convicted of a crime by proof beyond a reasonable doubt following a trial at which a host of procedural and substantive rights are guaranteed. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). This principle, the essence of the Fourteenth Amendment prohibition against deprivation of liberty without due process of law, is applicable to incarceration of juveniles pursuant to delinquency proceedings whether the purposes of such incarceration are termed punishment or treatment and rehabilitation. *See In re Winship*, 397 U.S. 358 (1970), *In re Gault*, 387 U.S. 1 (1967); *see also Breed v. Jones*, 421 U.S. 519, 530 and n.12 (1975). Nevertheless, the

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that substantial limitations and safeguards are necessary. *See e.g.*, Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 Va. L. Rev. 1223, 1235-39 (1969), Hruska, "Preventive Detention, the Constitution and the Congress," 3 Creighton L. Rev. 36, 39, 46, 54-56 (1969). Indeed the federal Office of Juvenile Justice and Delinquency Prevention, cited by the Amici for appellants in support of their position, advocates implemention of specific detention criteria as the solution to unnecessary pretrial detention of juveniles. *See* National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* 3.152 and commentary at pp. 297-98 (1980).

state may permissably detain a person suspected of committing a crime prior to a formal adjudication of guilt, *see Gerstein v. Pugh*, 420 U.S. 103 (1975), notwithstanding the fact that such detention subjects the accused to many of the same restrictive and burdensome conditions of confinement that are traditionally associated with punishment of the convicted. *See Bell v. Wolfish, supra.*

Historically, in the criminal justice system such a deprivation of liberty based upon accusation rather than conviction has been tolerated, pursuant to certain substantive and procedural protections, because of the state's interest in ensuring that the accused is present at trial. A criminal justice system premised upon punishment following conviction as a means for deterring and penalizing those who would violate the criminal law depends upon the ability of the state to compel the accused to submit to the process. This Court has thus referred to the "right to release before trial . . . conditioned upon the accuseds' giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

While the bail system has been the traditional means for expressing the balance between the liberty interest of the accused in avoiding the pretrial detention and the state interest in avoiding risk of flight, it is the appropriate balancing of individual and legitimate state interests, rather than the bail system itself, that raises the fundamental due process questions in any scheme for pretrial detention, criminal or juvenile.[3]

**1. *The Private Interests Affected.***

In analyzing the constitutional issues raised in the context of juvenile delinquency proceedings, this Court has

[3] The ABA takes the position that a bail system is an inappropriate mechanism for achieving the proper balance of state and individual interests in juvenile pretrial detention. *See ABA Juvenile Detention Standards* 4.7 and commentary thereto at pp. 63-66.

stressed the importance of a candid assessment of the realities of the stage of the proceeding under scrutiny. *In re Gault*, 387 U.S. 1, 21, 27 (1967). Such an analysis has led this Court to conclude that the private interests implicated in delinquency proceedings are comparable in constitutionally significant respects to those at stake in criminal prosecutions. *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 387 U.S. 358 (1970); *In re Gault, supra*. Of all the stages in the juvenile court process, pretrial detention is perhaps the least distinguishable from the criminal process in terms of the seriousness of the consequences for the person detained. This Court has recognized in the adult context the "serious impact on the individual" which pretrial detention entails: the disruption of personal and professional life, the subjection of the person detained to the stark conditions and restrictive practices of pretrial confinement, and the serious consequences of confinement for trial preparation. *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). The *ABA Juvenile Detention Standards* proceed from a premise that the impact of pretrial detention on the rights and interests of the juvenile is of comparable severity.

Besides being removed from family, friends, and school, a child detained pretrial is subject to conditions of confinement and institutional routines and practices which are often harsh. *See* R. Sarri, *Under Lock and Key: Juveniles In Jail And Detention* 35-63 (National Assessment of Juvenile Corrections 1974). *See also, Inmates of Boys Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Creek v. Stone*, 379 F.2d 109 (D.C. Cir. 1967); *Baker v. Hamilton*, 345 F. Supp. 345, 353 (W.D. Ky. 1972); *Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974). While certain extreme detention practices may be constitutionally prohibited, the decisions of this Court make it clear that once lawfully detained, a person may be subjected to personal indignities and hardships in the name of jail administration which, while constitutionally

permissible, are admittedly onerous and offensive to the individual. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

Pretrial detention creates obstacles to the effective preparation of a defense. *Stack v. Boyle*, 352 U.S. 1, 4 (1951). A defendant detained is "hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. at 533. Because investigative resources available to public defenders and appointed counsel are limited, the defendant who cannot help with necessary investigation because he is detained is at a serious disadvantage. Even the able and conscientious lawyer may have difficulty in identifying and locating witnesses since the lawyer is likely to be viewed as an outsider. When the defendant is a juvenile, "these difficulties may be exacerbated by the barriers of age . . ." *Kinney v. Lenon*, 425 F.2d 209, 210 (9th Cir. 1970). The correlation between pretrial detention and conviction which has been noted by numerous commentators in the criminal process, *see e.g.*, Rankin, "The Effect of Pretrial Detention," 39 N.Y.U.L. Rev. 641, 651-52 (1964); Wald, "Pretrial Detention and Ultimate Freedom: A Statistical Analysis," 39 N.Y.U.L. Rev. 640 (1964); L. Katz, et al., *Justice is the Crime* 152 (1972), may be in part attributable to the problems of trial preparation associated with pretrial detention. *See* Note, "Preventive Detention: An Empirical Analysis," 6 Harv. Civ. R.-Civ. Lib. L. Rev. 300, 348 (1971).

Moreover, detention may ultimately contribute to a sentence of imprisonment rather than probation upon conviction since it prevents the defendant from demonstrating an ability to adjust to community life during the predisposition period. *Id.* at 350-51. The impact of pretrial confinement upon disposition is of particular concern in the juvenile justice system. As one study cited by the *ABA Juvenile Detention Standards* noted:

> . . . the symbol of where one is detained has a lasting impact which carries over to where one is ini-

> tially placed. Detention in a custody unit restricts the youngsters' range of placement opportunities. This must underscore the importance of the original decisions concerning the question of whether to detain and where to detain. It seems that we cannot make this point too strongly. We have shown that where one is detained is, at least for those youth without a prior commitment, related to the commitment decision. And we have shown quite conclusively that where one is detained is related to initial program placement.

Coates, Miller, and Ohlin, *Juvenile Detention and Its Consequences* 22 (1975) cited in *ABA Juvenile Detention Standards* at 2. A similar observation is made in Edwards, "The Rights of Children," 37 Fed. Prob. 34, 37 (1973).

Finally, the psychological impact of detention upon children is widely acknowledged to be harmful. *See* National Council on Crime and Delinquency, *Standards and Guides for the Detention of Children and Youth* 3 (1961); R. Garff, *Handbook for New Juvenile Court Judges* 21 (1972); D. Anderson, E. Thomas, and C. Sorenson, *The Child's View of Detention* (1970); Komisaruk, "Psychiatric Issues in the Incarceration of Juveniles," 21 Juv. Ct. J. 117 (1971). Children tend to be more vulnerable, more impressionable, more devastated by separation from friends and family and subject to impersonal bureaucratic detention procedures. *See* Fetrow and Fetrow, "How a Pretrial Facility Can Destroy the Self Esteem of the Juvenile", 18 Int'l J. of Offender Therapy and Comparative Criminology 227-33 (1974); *In re William M.*, 3 Cal.2d 16, 31 n.25, 473 P.2d 737, 89 Cal. Rptr. 33, 43 (1970). The stigma associated with pretrial detention may not only damage the child's "standing and associations in the community", *Arnett* v. *Kennedy*, 416 U.S. 134, 156 (1974), but may in turn increase his associations with and identification with the delinquent subculture and foster delinquent tendencies. "Forced asso-

ciation with other delinquents intensifies [the child's] hostility to society and exalts his status in the delinquent group." Norman, *Think Twice Before You Build or Enlarge A Detention Center* 6 (1968).

The record in this case supports the ABA assessment of the serious consequences of pretrial detention for the juvenile. Beyond the obvious consequences of loss of physical liberty, the testimony presented in the District Court documents that the conditions of confinement in New York are severe, that the dangers of physical abuse as well as psychological harm are significant, and that the consequences for trial preparation and ultimate disposition are serious. J.A. at 105 n.24, 107 n.29, 130-34, 167-69, 172-74, 231-33, 270, 296-98, 303-04.

The several important interests at stake in the decision to detain a juvenile generally and in the specific detention of a juvenile under the New York statute must be given great weight in applying any constitutional balancing test.

***2. The Governmental Interest Involved.***

As previously discussed, the traditional justification for pretrial detention in the criminal justice system has been the state's interest in ensuring the presence of the accused at trial. As this Court noted recently, it has had "no occasion to consider whether any other governmental objective can constitutionally justify pretrial detention." *Bell v. Wolfish*, 441 U.S. at 454 n.15.

New York asserts its interest in preventing juveniles from committing crimes in the period between arrest and trial as the state interest to be served by the challenged statute. As distinguished from pretrial detention to prevent flight, pretrial detention to prevent future crimes to a significant extent "serves to displace . . . the established system of justice." Note, "Preventive Detention Before Trial," 79 Harv. L. Rev. 1489, 1503 (1966). In addition, unlike pretrial detention aimed at preserving

the jurisdiction and process of the courts, which focuses on such factors as a defendant's ties to the community and employment status, a pretrial determination that a person is dangerous implies a "moral judgment about the person affected" that is a characteristic of the criminal sanction. *See Bell v. Wolfish*, 441 U.S. 520, 581 n.10 (1979) (Stevens, J. dissenting). *See also* Note, "Due Process and the Pretrial Detention Provisions of the Federal Criminal Code Reform Bill of 1981," 47 Alb. L. Rev. 645, 663-64, 670 (1983).

This is not to say that the state's interest in protecting the community from criminal misconduct is not an appropriate factor to consider in pretrial decisionmaking. The bail system has traditionally addressed concerns for public safety in the pretrial period in a number of respects. First, the availability of bail in capital cases has always been discretionary thus allowing specific considerations of the risk of pretrial misconduct in the most serious cases. Second, since such factors as seriousness of the offense and likelihood of conviction can be related to risk of flight, *see Pretrial Release* 10-5.1(vii) and commentary thereto, often those who are perceived to pose a serious interim danger to the community are also those for whom the risk of flight warrants the setting of high bail. Finally, the criminal system has traditionally permitted imposition of conditions for release, violations of which can result in revocation of bail. Both in setting the conditions and in exercising the power to revoke based upon violaton, the system permits an additional mechanism for protecting the public from misconduct during the pretrial period. *See Pretrial Release*, 10-5.2 and commentary thereto.

The ABA has consistently recognized the legitimate interest of the state in protecting the community during the pretrial period, but questions New York's interest in preventive detention without standards or criteria as a method for protecting the community. New York's inter-

est in this particular scheme must be examined in light of its actual impact since whatever may be the appropriate state interests where an individual is demonstrably likely to endanger the community, there can be no question that the erroneous detention of those who do not pose a threat to the community advances no state interest. The state in fact has an interest in avoiding such unnecessary confinement. *See Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

### 3. *The Risk of Erroneous Deprivation.*

The risk of error inherent in detention decisions ungoverned by specific standards and criteria is borne out by the factual findings of the District Court and Court of Appeals with respect to the operation of the New York statute. Approximately two thirds of those detained pretrial were released within days or weeks either at or prior to disposition. J.A. at 59-61, 64-65, 102-03.

The results of New York's detention scheme are not surprising. The *ABA Juvenile Detention Standards* identify pretrial detention decisions as among the most error prone of any decisions made in the juvenile justice process. Decisions to detain have traditionally been made on the basis of inadequate information, through a rather cursory decisionmaking process, pursuant to broad grants of authority to detain with no specific criteria limiting the discretion of intake officers or judicial officials. *ABA Juvenile Detention Standards* at 2, 5-11. The result of these procedures has been an extraordinary high rate of pretrial detention of juveniles nationally. In 1978, for example, 392,662 children were admitted to secure detention in 372 juvenile detention centers and an additional 479,908 juveniles were detained in 3,493 county jails and 13,383 police lockups across the country. University of Illinois Community Research Center, *An Assessment of The National Incidence of Juvenile Suicide in Adult Jails, Lockups and Juvenile Detention Centers* 9 (1980).

The high rate of error in detention decisions is reflected in the comparison of the number of juveniles held pretrial with the number ultimately incarcerated following adjudication. One study cited by the *ABA Juvenile Detention Standards* revealed that of 409,218 juveniles detained pretrial, only 242,275 were either committed to a facility or placed on probation following adjudication." National Council on Crime and Delinquency, "Juvenile Detention" in "Correction in the United States," 13 Crime and Delinquency 1, 11, 15, 36 (1967). Another study of five jurisdictions found that of those detained pretrial the percentage of those removed from the community following disposition ranged from a low of 9.7% in one community to a high of 25.9% in another. Ferster, Snethen and Courtless, "Juvenile Detention: Protection, Prevention or Punishment", 38 Fordham L. Rev. 161 (1969). A more recent comparison of juveniles detained pretrial in juvenile detention centers (not including those detained in adult jails and lockups) with those ultimately placed in correctional facilities indicates a similar disparity. In 1979 there were 451,810 admissions to juvenile detention centers; however, only 65,416 children were subsequently institutionalized. Krisberg and Schwartz, *Rethinking Juvenile Justice* 12-13 (1981).

In light of the seriousness of the deprivation of liberty which pretrial detention entails, and in light of the existence of alternative procedures such as those set forth in the *ABA Juvenile Detention Standards*, the risk of error presented by detention procedures which allow detention based upon a generalized prediction of dangerous with no specific criteria identified for making such a decision is unacceptably great.

## CONCLUSION

For the foregoing reasons, the Amicus Curiae, American Bar Association, submits that the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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